No. 80-169

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED PARCEL SERVICE, INC.,

Petitioner,

vs.

WILLIAM MITCHELL,

Respondent.

BRIEF ON BEHALF OF RESPONDENT LOCAL 177, I.B.T. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement of Issues Presented for Review

Is the action for unfair representation in this cause actually an action to vacate the arbitration award?

Should there be a different statute of limitations applied in this cause as against the employer and the Union?

Should public policy in favor of speedy, final and binding decisions of labor-management grievances require the application of the statute of limitations applicable to vacation of arbitration in order to prevent labor-management chaos?

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Statement of the Case

Respondent Mitchell had been an employee of Petitioner United Parcel Service, Inc. (hereinafter known as "UPS") at the location of UPS in Staten Island, New York. He was discharged on January 13, 1977 by UPS upon the claim by UPS that he falsified his time cards and arranged thereby for pay for hours that he did not actually work.

He was a member of Local 177, Department Store and Wholesale Drivers, Warehousemen and Helpers of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter known as "Local 177" or the "Union") which is a party to a collective bargaining agreement with UPS which collective bargaining agreement encompasses the employment of Mitchell. The Union opposed the discharge and proceeded under the grievance procedure of the collective bargaining agreement referred to above to the Joint Atlantic Area Parcel Grievance Committee (hereinafter known as the "Panel"). This panel is part of the grievance procedure described in the collective bargaining agreement.

The panel issued an award on February 16, 1977 upholding the discharge of Mitchell by UPS. According to the collective bargaining agreement, this decision is final and binding.

Approximately one and a half years later, this suit was instituted by Mitchell under Section 301(a) of the Labor Management Relations Act of 1947. The complaint herein alleges that UPS's discharge violated the collective bargaining agreement and that the Union had failed to represent him fairly in certain ways, including not paying Mr. Mitchell's way to the panel arbitration which was held in Virginia, and holding the arbitration in Virginia and in not providing effective arguments and witnesses.

The Joint Atlantic Area Parcel Grievance Committee panel is a procedure established under a master collective bargaining agreement covering many Locals and UPS for most of the eastern coast states, including approximately 89 Locals from New England to South Carolina, inclusive. The panel may hear cases from many or all of those states and sets its meeting dates and places without securing the approval of any individual Local or division of UPS.

Local 177 as a practice has never paid for any grievant's travel costs to the location of the panel hearings. The panel acts according to its rules by joint action of representatives of management and labor, the labor side of the panel being chosen from among the various east coast Locals mentioned above.

The defendants moved for Summary Judgment in the District Court case alleging that the action was barred by New York Civil Practice and Rules §7511(a) which provides for a 90 day statute of limitations for any action to vacate an arbitration award. The case was not started timely under the 90 day statute of limitations provided therefor. Plaintiff Mitchell argued that a six year statute of limitations should apply under New York law because the action was one in contract with the Union violating a contract of membership by failing to represent properly.

The District Court granted Summary Judgment on the Defendants' motion dismissing the complaint, further stating that the action was one to vacate an arbitration award. The reasoning therein was that since the arbitration award did exist, the action must be one to vacate an arbitration award because its very existence allowed the discharge of Mitchell to stand. Mitchell appealed to the Court of Appeals which overuled the District Court, citing *Hines* v. *Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976) for the proposition that the fair representation aspects of the case brought it under the six year contract statute of limitations, reversing entirely the District Court's dismissal.

The Petition for Writ of Certiorari was granted.

ARGUMENT

POINT I

The 90 day statute of limitations should be applicable to this suit as to the claims against both the employer and the union.

Plaintiff in this cause has commenced action against the union for unfair representation and the company for improper discharge. No matter what course or combination thereof plaintiff chooses to follow is eventually confronted with the fact that an arbitration award sustaining his discharge exists. He has no job with UPS unless and until the arbitration award is disposed of by vacation, modification or rehearing. The New York statute involved, N.Y. Civ. Prac. Laws and Rules §7511, *et seq.*, provides that arbitrations may be vacated, modified or confirmed. In the event of vacation, the arbitration may be retried before the same arbitrator or another arbitrator.

Plaintiff has not explored in the pleadings in this case the possibility of vacation or rehearing the arbitration. However, that, of course, is always an outstanding possibility. Given the existence of the arbitral decision, that decision must be disposed of some how either by sustaining it or vacating it to have any benefit to the plaintiff. *Hines* v. *Anchor Motor Freight, Inc., supra,* recognizes the distinction between the two claims, namely that against the employer and that against the union for unfair representation. It further holds that the arbitration itself may be void if there were substantially unfair representation of plaintiff by his union. Should this be found, it would result in a vacation (and possibly a rehearing) of the award.

The questions which arise from this status concern what shall be the statute of limitations applicable to plaintiff's claim? Also, the question arises: should there be a different statute of limitations, one as to the union and another as to the company?

The case against the union and the case against the company both arise out of contract. The case against the union relies upon a contract of membership. The case against the company arises out of the contract of employment.

Most states and the federal jurisdiction apply a 90 day statute of limitations to actions to vacate an arbitration award. This is true even though the employee's rights, vis-a-vis, his employer are contractual. There is nothing new or shocking about limiting this contractual action (vacation of an arbitral award) to 90 days.

However, the Second Circuit Court of Appeals decided that it is unfair to apply it as against the union. The union in this case urges upon this Court that the 90 day statute of limitations is no more shocking as regards the claim against the union for unfair representation than it is against both the union and the employer where the arbitration is the final step of the contractual procedure concerning the employee's job rights.

The United States Court of Appeals for the Second Circuit in its decision in this case lists its reasons for applying a longer statute of limitations to plaintiff's claim in this case. On page 1531 of the decision below (A11) the court states: "This is a heavy burden which the § 301 plaintiff must shoulder in order to overturn his discharge . . ." The Union urges that the burden is no different at all than that required to overturn an arbitration award against the company and the union.

Precisely the same facts must be marshalled and presented in either case. Where then is the logic in saying that when suing to vacate the arbitration award against both the company and union in effect, 90 days is sufficient but that when suing the union alone 6 years is proper?

It is the belief of the union in this case that the Court below has misread *Hines* by overextending its logic. As stated previously, *Hines* defines the two separate rights as against the union and as against the company and the arbitration award. *Hines* does not decide the question of the applicable statute of limitations.

UPS has in its Supplemental Brief In Support of Petition for a Writ of Certiorari cited the recent case of *Liotta* v. *National Forge Co.*, decided by the Third Circuit Court of Appeals on September 10, 1980. It is the belief and the position of the union herein that the reasoning in that case applies to the statute of limitations in this case. That case holds that an action similar to the one here involved is a case to vacate an arbitration award even though it involves alleged union breach of duty of fair representation. This case cites *Barbarino* v. *Anchor Motor Freight, Inc.* and others to the same effect. Nothing in that decision disagrees with the concepts of *Hines*.

It is important herein to point out additional factors of prime importance: why the 90 day statute of limitations should apply and should apply to both company and union.

The practicalities of the situation almost dictate what course the union believes this Court should follow. If the union arbitrates a discharge of an employee or a variety of other grievances, the only reason for arbi-

trating would be to solve an outstanding dispute. It can be imagined that frequently the resolution of the dispute is more important to the parties than the individual decision. This is clearly the import of all of the cases in the field. Many of the cases contain phrases which indicate an expectation that arbitration is not perfect and that speedy solution to disputes is to be desired to maintain industrial peace.

If a union is faced with a 6 year statute of limitations, the officers of that union may be out of office, the witnesses may be retired, transferred or otherwise unavailable on both sides. The union can never feel that a decision of an arbitrator is final and binding knowing that 6 years in the future it may be held for damages or to reopen a discharge case based upon an allegation of a breach of the duty of fair representation. Knowing this to be true, what motive would there be for a union to arbitrate at all? It would be faced with the effort of an arbitration and the effort to settle a dispute with full knowledge none of these matters can be laid to rest with confidence for 6 more years. In six years questions of other employees' seniority, retirement, job choice, welfare claims and a myriad of others would have to be restructured, if possible, to meet a possibly adverse finding 6 years after arbitration. Obviously, these questions present an impossibility for a union. If an employee six years later is determined to have been the victim of unfair representation, he may be awarded his job back or he may be awarded damages against the union alone or the company alone or any combination thereof. How will questions of hospitalization benefits, sickness and promotions be determined when other employees may have filled the plaintiff's job in good faith?

Rather than face this impossible panoply of insolvable problems, unions would quite likely feel that it would be wrong to maintain a grievance procedure at all. Perhaps both union and company would feel that they are facing impossible alternatives no matter which way an arbitration is decided. Would it not be simpler for a union to negotiate out a no strike clause and a grievance clause and allow the forces of economic stress such as work stoppage, lock-out and the like to hold sway and settle upon the conditions resulting from each individual combat? At least the company and the union would not be faced with a suit as much as six years later to determine whether they had properly represented an employee in attempting to follow an open-ended grievance procedure such as plaintiff proposes in this case.

Both union and company, in the event of a lock-out or a work stoppage would be put to the test of their economic strength and win or lose immediately by either conceding that the union had won its point or the company had won its point by one side or the other giving in immediately.

UPS in its briefs supporting Petition for Writ of Certiorari in this case has pointed this same factor out. They point out that only where the company wins an arbitration would they be subject to a subsequent suit by the aggrieved employee. On the union's side, it is here urged that only when the union loses a case or a point therein would the possibility of a distant unfair representation suit arise. However, not knowing the outcome of each case, the union could never predict the future of an unfair representation case years away. The damages and the consequences that could flow from the ultimate decision of such a case are so unknown and could involve large numbers of employees, that the motive to settle a grievance through contractual procedures is totally removed from the labor-management picture.

It is for this reason that the union urges that the very same 90 day statute of limitations that is applied in the *Liotta* case should be applied in this case. It would solve nothing to say that the case against the employer should have a 90 day statute of limitations but the case against the union (also based on contract) should have a 6 year statute of limitations because of the obvious union choice in the future not to rely on arbitration or contractual procedures. Certainly, a union, consulting its legal counsel, could not be told with any certainty that the arbitration settles the issue. Many lawyers would be constrained in the event of a 6 year statute of limitations to tell his client, the union, that sometime in the future a discharged employee or an employee aggrieved in any other way could raise some issue before a jury in a Federal District Court and subject the union to a large damage award and to all of the other consequences described above.

It is the belief of Local 177 that this case is of paramount importance to the structure of labor law in the future. The situation of a long statute of limitations in labor relations such as is sought here by plaintiff is an absolute impossibility to live with. It is impractical and unfair, not only to the employer but to every member of the bargaining unit represented by the union. No one could count upon a decision being effective. All of the daily decisions in the work place would have to be tentative for an insufferably long period of time. This is exactly the type of situation which all of the case law and all of the statutory law strong opposes. It is for these reasons obviously that the federal policy has always been and must continue to be a final and binding decision in an expedited fashion upon which the parties may rely thereafter.

The union feels in this case that the allegations concerning the unfair representation are spurious and frivolous at best. However, even where they may be substantial, the

overriding policy questions are so far reaching in nature as to mitigate against a long statute of limitations in industrial disputes. As has already been pointed out, if the arbitration itself were faulty for some reason other than a failure of duty of fair representation, the 90 day statute of limitations applies. That is the reason behind the majority of states and the federal jurisdiction itself in applying such a 90 day limit. These 90 days limits have been in effect for many, many years and there are many cases where one side or the other proceeds to attempt to vacate, modify or confirm arbitration awards within the 90 day time limit. In this cause Mitchell knew immediately that the union would not pay his way to the situs of the panel hearing. He knew immediately that he would not attend the hearing. He knew immediately what arguments were being presented on his behalf. There is nothing whatsoever in this case to indicate that new facts emerged after 90 days from the date of the arbitration decision. What could possibly be the reason or the logic behind arguing for a longer statute of limitations? The Second Circuit Court of Appeals in this case overemphasized the difficulties of Mitchell in starting a case. There is no explanation of why Mitchell took 17 months to consult an attorney and start this case. The union herein disagrees with the paragraph beginning at the bottom of page 1531 of the Decision below. At the bottom of page 1532, the Court below states that ". . . a §301 action is procedurally quite distinct from any action to vacate or modify an arbitration award. . . ." This is not conceded by the Union in this cause. Both cases must start with a complaint and some form of process. Presumably a lawyer would be involved. The case of *Donato* v. *American Locomotives,* 283 App. Div. 410, Aff'd 306 N.Y. 966 (1954) interpreting the New York statute §7511 holds that an arbitration award may be vacated on the application not only by a party to the collec-

tive bargaining agreement but also a person in the place of a third party beneficiary (such as Mitchell) who neither participated in or was served with notice of the arbitration. The case went on to say that even in those situations the 90 day statute of limitations applies and that the action is one to vacate an arbitration award.

So, plaintiff in this cause availed himself of no facts in addition to those he knew immediately and was in no substantially different position with regard to starting a U.S. District Court case under §301 or an action either in state or federal court to vacate an arbitration award. The union in this cause also subscribes to the arguments made by UPS in its brief below in the Second Circuit Court of Appeals and its arguments in its Petition for Writ of Certiorari and its Supplemental Brief in Support of Petition for Writ of Certiorari in this cause.

CONCLUSION

The 90 day statute of limitations contained in New York State law should be applied to this cause equally to both employer and the Union for reasons of important public policy to promote peaceable and final and binding settlement of disputes in the labor-management field.

Respectfully submitted,

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Dated: November 24, 1980